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No. 98-217

In the Supreme Court of the United States

OCTOBER TERM, 1997

PARK VILLAGE APARTMENTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Federal Claims properly applied a standard contract provision limiting the annual rent adjustments available to participants in the Department of Housing and Urban Development's (HUD) Section 8 low-income and elderly housing assistance program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 152 F.3d 943 (Table). The opinions of the Court of Federal Claims are reported at 32 Fed. Cl. 441 (*Park Village II*) (Pet. App. 3a-28a) and 25 Cl. Ct. 729 (*Park Village I*) (Pet. App. 29a-41a).

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1998. A petition for rehearing was denied on May 5, 1998 (Pet. App. 108a). The petition for a writ of certiorari was filed on August 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contracted with HUD under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (Section 8), to build an 84-unit, federally-assisted apartment building for low-income and elderly tenants. Petitioner also entered into a housing assistance payments (HAP) contract with HUD, effective May 24, 1978, which established an initial maximum monthly rent for each assisted rental unit in the project ("initial contract rent") and provided for the annual adjustment of that rent under certain circumstances. Pet. App. 4a, 29a.

The annual rent adjustments are calculated using an Annual Adjustment Factor (AAF), periodically determined by HUD for each geographic area and published in the *Federal Register*. Thus, HUD annually adjusted petitioner's contract rent by applying the AAF to the initial contract rent on the first anniversary date, and then to the preceding year's adjusted contract rent on subsequent anniversary dates. Pet. App. 4a-5a, 30a-31a.

The HAP contract included a standard provision limiting the annual rent adjustment that would otherwise result from applying the AAF. Section 1.8(d) of the HAP contract specified that:

> Overall Limitation
>
> Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and

> comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

Pet. App. 5a, 31a.

As the second clause suggests, the initial contract rent was slightly higher than the rent of a comparable unassisted unit (i.e., the market rent); the difference between the initial contract rent and the market rent was intended to compensate project owners for the additional expense of participating in the Section 8 program.

2. In 1988, petitioner filed suit in the United States Claims Court (now called the Court of Federal Claims) alleging that HUD's annual application of the AAF to the prior year's adjusted rent left petitioner with an adjusted rent materially below the market rent for comparable unassisted properties, in violation of the HAP contract's overall limitation provision. On April 14, 1992, the trial court ruled that the provision was intended to protect both HUD and the Section 8 property owner from adjusted rents that differed materially from market rents. Pet. App. 33a.

On December 21, 1994, after a trial of the remaining issues, the trial court dismissed the complaint. Based on established HUD practice, the trial court determined that "the overall limitation would be triggered only when the [market rents] are at least 20 percent higher than the [AAF]-based contract rent." Pet. App. 15a. The trial court adopted the comparability studies conceived and executed by the government's expert appraiser to determine prevailing market rents. *Id.* at 28a. Because market rents plus the initial difference between the contract rent and the market rent never exceeded actual contract rents by 20% or more, the trial

court found that there was never a material difference between the adjusted contract rents and the market rents. *Ibid.* Thus, HUD's annual rent adjustments, calculated using the published AAFs, did not violate the HAP contract's overall limitation provision.

3. The Federal Circuit affirmed for the reasons stated in the trial court's opinion in *Park Village II*. Pet. App. 1a-2a.

ARGUMENT

Petitioner asks this Court to correct errors it says the trial court made in applying the overall limitation provision of the contract to the facts of this case. Pet. 15-16. Specifically, petitioner argues that the provision entitles Section 8 landlords to adjusted rents based on prevailing market rents whenever a comparability study is done. Pet. 15. Petitioner also argues that the trial court erred in basing its market rent findings on rental "trends" instead of comparability studies. Pet. 15-16. Finally, petitioner argues that the trial court erred in considering the initial difference between the contract rent and the market rent as a fixed dollar amount rather than as a fixed percentage. Pet. 16.

Further review is not warranted in this matter. None of the rulings by the trial court are erroneous, or in conflict with any decision of this Court or any court of appeals. The trial court properly applied the overall limitations provision to the facts of this case.

1. Petitioner argues that, following a comparability study, it is always entitled to both the prevailing market rent and the initial difference between contract and market rents. Pet. 17-21. The court below concluded the petitioner is not automatically entitled to either; it is entitled only to an adjusted contract rent that is not materially different from (i.e., between 80%

and 120% of) the prevailing market rent plus the initial difference. Pet. App. 14a-15a.

a. To support its claimed "right" to prevailing market rents, petitioner almost exclusively offers soundbites from briefs filed by HUD in a different case involving different parties and different issues. Pet. 18-19. In its only other citation, *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 19 (1993), petitioner simply misreads this Court's opinion. Pet. 20. Under *Alpine Ridge*, contract rents and prevailing market rents may not be materially different; nothing requires them to be precisely the same.

b. Petitioner's alleged entitlement to the initial difference is based on the second clause of Section 1.8(d) of the HAP contract, which states in full that:

> Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; *provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.*

Pet. App. 5a (emphasis added).

To find a right to the initial difference, petitioner seems to read "shall not be * * * prohibit[ed]" to mean "is required." Pet. 21. This interpretation is obviously incorrect. Properly construed, the proviso modifies the "material difference" term contained in the "notwithstanding" clause of this provision. Thus, when comparing contract and market rents, the initial difference must be considered so otherwise material

differences are not obscured. The trial court correctly implemented the proviso by adding the initial difference, $37, to the Government's market rent determinations before deciding whether there was a material difference. Pet. App. 27a-28a. Thus, in accordance with the proviso, the trial court did not construe the notwithstanding clause to prohibit the initial difference of $37. The trial court found no material difference between the market rents and petitioner's adjusted contract rents, even accounting for the initial difference. *Id.* at 27a-28a.*

Petitioner's interpretation of the proviso ignores its clear purpose as a modifying phrase, and turns the limitation provision into a substantive right to market rent plus the initial difference. This strained construction is inconsistent with its actual language and was properly rejected by the trial court. No other court has accepted petitioner's interpretation of this clause.

2. Petitioner asserts that the trial court's adoption of the government's comparable rent determinations was in error because its expert purportedly relied on "market trends" in reaching his conclusions. Pet. 21-23. This objection to the trial court's findings of fact lacks merit.

The government's expert selected a large sample of comparable unassisted units for his study and made dollar adjustments by comparing the market value of the attributes (amenities, location, *et cetera*) of the

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* According to petitioner, the Federal Circuit in *National Leased Housing Ass'n* v. *United States*, 105 F.3d 1423, 1435 (1997), "ruled * * * that the premium must be maintained." Pet. 21. In fact, the passage petitioner quotes merely describes—by way of a hypothetical—the litigating position of a party; it does not reflect the court's holding (which dealt with a different question).

selected properties with the attributes of the subject property, Park Village Apartments. As an additional step, the expert also prepared a statistical trend analysis to confirm that his comparable rent determinations were accurate. Pet. App. 16a-18a. It was abundantly clear in his report, and at trial, that the trend analysis served only as a "reality check." *Ibid.* The trend analysis was not a substitute for the actual selection and analysis of comparable properties, as petitioner now contends.

3. Petitioner asserts that the initial difference, referred to in the "proviso" of the overall limitation provision, should be preserved throughout the life of the contract as a percentage of the prevailing market rent of comparable unassisted units. Pet. 23-28. In another case, the court of appeals explained that:

> This provision permits the property owners to be compensated for the additional costs of complying with and participating in the Section 8 program. Most of these costs, such as debt service and special amenities, are fixed at the time of the contract. A fixed dollar initial difference would thus compensate the owners for these additional costs. Allowing the initial difference to escalate over time, in some instances at least, would produce a windfall for the landlord.

National Leased Housing Ass'n v. *United States*, 105 F.3d 1423, 1435 (Fed. Cir. 1997). In this matter, evidence was introduced that the Section 8 program costs leading to the initial difference between contract and market rents, such as development costs and debt service, were largely fixed at the time of contracting. Pet. App. 23a. The trial court's determination that the initial difference should be preserved as a fixed amount

was correct and not in conflict with any opinion of this Court or any court of appeals.

4. The decision below does not conflict with any other court decision. Petitioners allege a conflict only with *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993). Pet. 17-21.

In *Alpine Ridge*, the Court considered a Section 8 case in which HUD relied on comparability studies to cap rent increases that would otherwise result from applying the annual adjustment factor. The Court found that the overall limitation clause of HUD's standard HAP contract permitted "the use of comparability studies to impose an independent cap on the formula-based rent adjustments." 508 U.S. at 17. In reaching this conclusion, the Court stated that:

> The rent adjustments indicated by the automatic adjustment factors remain the *presumptive* adjustment called for under the contract. It is only in those presumably exceptional cases where *the Secretary* has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue.

Id. at 19 (emphasis added).

The *Alpine Ridge* case involved a situation starkly different from—indeed, almost exactly opposite to—the situation here. In *Alpine Ridge*, HUD relied upon comparability studies to *decrease* a Section 8 property owner's "materially inflated" adjusted contract rent, whereas petitioner here seeks to rely upon comparability studies to require an *increase* in the adjusted contract rent that would otherwise be automatically implemented under the AAF. *Alpine Ridge*, which upheld HUD's authority to use comparability studies to limit rents that would otherwise result from automatic

adjustments, simply does not address a claim such as petitioner's. Petitioner's reliance on *Alpine Ridge* as presenting a conflict with the decision of the trial court here, as affirmed by the court of appeals, is accordingly misplaced.

Indeed, the trial court's determinations in this case were in no way inconsistent with this Court's decision in *Alpine Ridge*. Here, the trial court was required to consider when rent differences become "material" for the purposes of the overall limitation clause, a matter not at issue in *Alpine Ridge*. The court found that petitioner's adjusted rents were not materially different from market rents. As a result, petitioner properly received the rent resulting from application of the AAF, the "presumptive adjustment" under the contract. 508 U.S. at 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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